Lee Kam Sun v Ho Sau Lin & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-297 OF 1999
JAMES FOONG J
7 OCTOBER 1999

Legal Profession *— Duty to client — Conflict of interests — Firm of solicitors retained to act for plaintiff in drafting of sale and purchase agreement and in ensuing litigation — Possibility that solicitor from same firm would be called as witness by defendant — Whether a conflict of interest would arise — Whether firm of solicitors retained by plaintiff should discharge themselves from acting for plaintiff in the civil litigation — Whether court had inherent jurisdiction to order solicitors to cease acting for plaintiff in the civil litigation*

The plaintiff had agreed under a sale and purchase agreement ('the agreement') to purchase two industrial lots ('the property') in an industrial complex from the first defendant. In the preparation of the agreement and relevant documentation, the plaintiff was represented by Messrs Cheah, Teh & Su ('CTS'), a firm of advocates and solicitors. The second defendant, an advocate and solicitor represented the first defendant and acted as the stakeholder. After the execution of the agreement, the plaintiff paid the full purchase price according to the terms and conditions of the agreement. However, a dispute arose between the parties over two parking bays. The first defendant alleged that the sale of the property did not include the parking bays whilst the plaintiff contended otherwise. The plaintiff terminated the agreement and filed a writ against the defendants claiming the return of the purchase price with punitive damages. In the statement of claim, the plaintiff besides claiming an implied term for the inclusion of the parking bays in the agreement further alleged a collateral agreement in respect of the parking bays. In due course, the plaintiff applied for summary judgment vide encl 5. At the outset of the hearing of encl 5, counsel for the first defendant raised a preliminary objection that CTS, the firm acting for the plaintiff, be disqualified from further representing the plaintiff in the civil action. Counsel for the first defendant contended that CTS were solicitors for the plaintiff in drawing up the agreement and were actively advocating that the parking bays were appurtenant to the property. There was therefore a possibility of the defendants adding CTS as a party to the proceedings or calling upon them to testify. Both counsel for the plaintiff in arguing that their firm should not be disqualified, submitted that they were not the solicitors involved in the property transaction and would not be called to testify as witnesses. Thus they should be allowed to continue to act for the plaintiff in the civil action.

Held, allowing the preliminary objection:

(1) It is a well established principle that lawyers should not act as counsel and witnesses in the same proceedings. This rule however does not apply if the testimony of the advocate and solicitor so acting relates to matters which are formal and non-contentious

such as identification, attestation, custody of documents and the like. In the instant case, had the issue of the case been merely confined to the interpretation of the terms of the agreement, then s 92 of the Evidence Act 1950 would have applied and no oral evidence would be admitted to contradict, vary, add to or subtract from it. In such a situation, any testimony of CTS would be limited to the attestation of the agreement and thus fall within the exceptions of the rule on the conflict of interest in acting for the plaintiff. However, the plaintiff's claim of a collateral contract immediately fell within the proviso of s 92 of the Evidence Act 1950 for parties to introduce oral evidence to support or deny the assertion. In such a situation, the solicitor in CTS handling the conveyancing of the property could be called upon by the defendants to give evidence and his testimony would be more than a mere formality. For this reason, CTS should discharge themselves from acting for the plaintiff to maintain decorum and avoid a conflict of interest (see pp 512F, H, 513C–F).

(2) Although both counsel for the plaintiff were not personally retained by the plaintiff, yet their firm was. The proximity and relationship of partners and legal assistants in the same firm was too close for comfort to ensure that a conflict of interest will not be practised. The court had and would exercise its inherent jurisdiction to order CTS from acting for the plaintiff in the suit (see p 513F–I).

[Bahasa Malaysia summary

Plaintif telah bersetuju di bawah perjanjian jual beli ('perjanjian tersebut') untuk membeli dua lot industri ('hartanah tersebut') di sebuah kompleks industri daripada defendan pertama. Di dalam penyediaan perjanjian dan juga dokumentasi yang berkenaan, plaintif telah diwakili oleh Tetuan Cheah, Teh & Su ('CTS'), suatu firma peguambela dan peguamcara. Defendan kedua, seorang peguambela dan peguamcara telah mewakili defendan pertama dan bertindak sebagai pemegang amanah harta (stakeholder). Selepas pelaksanaan perjanjian, plaintif telah membayar penuh harga belian menurut terma-terma dan syarat-syarat perjanjian tersebut. Namun, suatu pertikaian timbul antara pihak-pihak berkenaan dengan dua kawasan meletak kereta. Defendan pertama mengatakan yang penjualan hartanah tersebut tidak termasuk kawasan meletak kenderaan tersebut sementara plaintif menegaskan sebaliknya. Plaintif telah menamatkan perjanjian dan telah memfailkan writ terhadap defendan dan menuntut pengembalian harga belian dengan ganti rugi punitif. Di dalam pernyataan tuntutan, plaintif selain daripada menuntut suatu terma tersirat untuk kemasukan kawasan meletak kereta di dalam perjanjian selanjutnya mengatakan wujudnya suatu perjanjian kolateral berkenaan dengan tempat meletak kereta tersebut. Kemudian, plaintif memohon untuk penghakiman terus melalui

kand 5. Semasa perbicaraan kand 5, peguam untuk defendan pertama membangkitkan bantahan awal bahawa CTS, firma yang mewakili plaintif dijadikan tidak layak daripada terus mewakili plaintif di dalam tindakan sivil tersebut. Peguam untuk defendan pertama menegaskan bahawa CTS adalah peguamcara untuk plaintif di dalam menyiapkan perjanjian tersebut dan dengan aktif mengatakan bahawa tempat meletak kereta tersebut adalah termasuk di dalam hartanah tersebut. Oleh itu, terdapat kemungkinan bahawa defendan memasukkan CTS sebagai suatu pihak di dalam prosiding-prosiding atau memanggil mereka untuk memberikan keterangan. Kedua-dua peguam plaintif dalam menghujahkan bahawa firma mereka tidak patut dijadikan tidak layak, berhujah bahawa mereka bukanlah peguamcara yang terlibat di dalam transaksi hartanah tersebut dan tidak akan dipanggil untuk memberikan keterangan sebagai saksi-saksi. Oleh itu, mereka patut dibenarkan untuk terus mewakili plaintif di dalam tindakan sivil.

Diputuskan, membenarkan bantahan awal:

(1) Adalah suatu prinsip yang mantap bahawa peguam-peguam tidak bertindak sebagai peguam dan saksi-saksi di dalam prosiding-prosiding yang sama. Tetapi peraturan ini tidak terpakai jika keterangan peguamcara dan peguambela adalah berkenaan dengan perkara-perkara yang rasmi dan tiada bantahan seperti identifikasi, mengakusaksi, kawalan dokumen-dokumen dan sepertinya. Di dalam kes ini, jika isu kes tersebut hanya dibataskan kepada penafsiran terma-terma perjanjian, dengan demikian s 92 Akta Keterangan 1950 akan terpakai dan tiada keterangan lisan akan diterima masuk untuk menyangkal, mengubah, menambah atau mengecualikan daripadanya. Di dalam siatuasi begini, sebarang keterangan CTS akan dihadkan kepada mengakusaksi dokumen-dokumen dan dengan itu terjatuh di bawah pengecualian kaedah bercanggah dengan kepentingan diri dalam mewakili plaintif. Namun, tuntutan plaintif mengenai kontrak kolateral adalah terjatuh di bawah proviso s 92 Akta Keterangan 1950 untuk pihak-pihak mengemukakan keterangan lisan untuk menyokong atau menidakkan penegasan tersebut. Di dalam situasi begini, peguam CTS yang mengendali pemindahhakan hartanah boleh dipanggil oleh defendan-defendan untuk memberikan keterangan dan keterangannya adalah lebih daripada formaliti sahaja. Atas sebab ini, CTS patutlah berhenti daripada mewakili plaintif untuk mengekalkan ketertiban dan untuk mengelak kepentingan yang bertentangan (lihat ms 512F, H, 513C–F).

(2) Walaupun kedua-dua peguam tidak diretainkan secara peribadi oleh plaintif tetapi firma mereka telah diretainkan. Hubungan dan kedekatan rakan-rakan kongsi dan juga pembantu guaman di dalam firma yang sama adalah terlalu dekat untuk memastikan bahawa kepentingan bertentangan tidak akan dipraktikkan. Mahkamah mempunyai dan akan melaksanakan bidang kuasa

sedia ada untuk mengarahkan CTS daripada bertindak untuk plaintif di dalam tindakan tersebut (lihat ms 513F–I).] A

Notes

For case on conflict of interests, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1445–1450. B

Cases referred to

Emperor v Dadu Ramu AIR 1939 Bom 150 (refd)
PP v Vengadasalam & Ors [1990] 1 MLJ 507 (refd)
Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 AMR 2947 (refd) C
Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679 (refd)

Legislation referred to D

Evidence Act 1950 s 92
Legal Profession (Practice & Etiquette) Rules 1978 rr 3, 4, 5, 27, 28(a), 29
Rules of the High Court 1980 O 81

TS Su (*Jayne Koe* with him) (*Cheah Teh & Su*) for the plaintiff. E
Edward Chin (*V Krishnan* with him) (*Kris & Edward Chin*) for the first defendant.
T Sudharsanan (*Shook Lin & Bok*) for the second defendant.

James Foong J: F

Introduction

Enclosure 5 is an application of the plaintiff for summary judgment under O 81 Rules of the High Court 1980 ('the RHC').

The facts of this case is simply this: On 14 September 1998, the plaintiff agreed under a sale and purchase agreement (the agreement) to purchase two industrial lots (the property) in an industrial complex at Bandar Petaling Jaya from the first defendant for a sum of RM400,000. Subsequent to the execution of the agreement, the plaintiff paid the full purchase price according to the terms and conditions wherein, part of it (RM60,000) was deposited with the second defendant who is a solicitor for the first defendant as stakeholder. In consequence of this, relevant deeds of assignment of the property (there being no individual document of title issued) were executed by the parties. They are yet, however, to be perfected with the consent of the developer. The delay in perfecting the documentation was due to withholding of these documents by the defendants for reason that there is a dispute over two parking bays in the industrial complex. According to the first defendant, the sale of the property does not include these car parks whilst the plaintiff is of a different view. Unable to resolve this dispute, the G H I

plaintiff terminated the agreement insisting that the first defendant did not perform her part of the obligation in perfecting the deeds of assignment. This was soon followed by the filing of a writ against the defendants seeking a declaration that the agreement is terminated and claiming the return of the purchase price with punitive damages. Enclosure 5 is a sequence of this process.

Preliminary objection

At the outset of the hearing of encl 5, first defendant counsel raised a preliminary objection that M/s Cheah, Teh & Su (CTS), the firm of advocates and solicitors acting for the plaintiff, should be disqualified from further representing the plaintiff in this case. His ground is that CTS were solicitors for the plaintiff in drawing up the agreement and were actively advocating that the car parking bays were appurtenant to the property. Further, there is a possibility that CTS may be brought in as a party to this proceedings by the defendants or called upon by them to testify. In view of this, CTS has breached rr 3, 4, 5, 27, 28(a) and 29 of the Legal Profession (Practice and Etiquette) Rules 1978 (the Etiquette Rules).

Ms Koe, joined subsequently by Mr Su, of CTS argued strenuously that the facts of this case do not warrant the disqualification of their firm to act for the plaintiff. In any event, both Miss Koe and Mr Su declared that they were not solicitors involved in this property transaction and thus, will not be called to testify as witnesses. Further, they claimed that the defendants have acknowledged and recognized CTS's role as advocates and solicitors in this case by making no prior protestation and serving on CTS interlocutory applications.

Analysis

It is a well-established principle that lawyers should not act as counsel and witnesses in the same proceedings. The reason, as expounded by Beaumont CJ in *Emperor v Dadu Ramu* AIR 1939 Bom 150, is: 'An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may feel that justice will not be done if the advocate continues to appear'. This rule is expressly accepted by the Federal Court in *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679 at p 678. But in the list of authorities combed over by Abdul Malik Ishak J in *Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 AMR 2947, there are exceptions to this rule. It does not apply if the testimony of the advocate and solicitor so acting relates to matters which are formal and non-contentious such as identification, attestation, custody of documents and the like. In fact the Etiquette Rules r 28(a) only prohibits such advocate and solicitor from appearing in respect of a 'material and disputed question of fact'. The reason for this limitation is best illustrated in the case of *Emperor v Dadu Ramu*, where again Beaumont CJ proceed with: 'On the one hand, an accused person is entitled to select an advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice. On the

other hand, the court is bound to see that the due administration of justice is not in any way embarrassed.' A

Having determined the set of principles applicable, one must proceed to examine from available facts to decide whether the circumstances of this case warrants the up-holding of the defendants' objection.

It is not disputed that the agreement is silent on whether the car parking bays are an appurtenant of the property. In the preparation of this agreement, the plaintiff was represented by CTS whilst the first defendant by the second defendant. When the issue over the car park bays arose, the respective advocates and solicitors took positions in the interpretation of the terms of the agreement. If the issue of this case is confined only to the interpretation of the terms, then s 92 of the Evidence Act 1950 will apply and no oral evidence will be admitted to contradict, vary, add to or subtract from it. In such a situation, any testimony of CTS will be limited to the attestation of the agreement and thus falls within the exceptions of this rule on the conflict of interest in acting for the plaintiff. But in para 8 of the plaintiff's statement of claim, besides alleging that it is an implied term in the agreement that the car parking bays are included in the sale of the property, it added: 'and/or a collateral agreement that the car park lots identified as Lot No CP108 & CP109 are parcels appurtenant to the Properties and shall form part of the said Properties ...'. This claim of a collateral agreement immediately falls within the proviso of s 92 of the Evidence Act for parties to introduce oral evidence to support or deny this assertion and on such an occasion the solicitor in CTS handling the conveyancing of the property may be called upon by the defendants to give evidence. His testimony will undoubtedly be more than a formality in presenting a document or affirming to an attestation of it. For this, I am of the view that CTS should discharge themselves from acting for the plaintiff to maintain decorum and avoid a conflict of interest as elaborated above. B C D E F

On the proposition put forth by both Ms Koe and Mr Su that they were not the solicitors involved in the conveyancing of the property and for this they should be allowed to act for the plaintiff here, I am afraid that they have not considered the fact that it is not they who were retained by the plaintiff in this suit. The firm of CTS was the retainer and as duly considered by Abdul Malik Ishak J in *Syarikat Pengangkutan* case, the proximity and relationship of partners and legal assistants in the same firm is too close for comfort to ensure that a conflict of interest will not be practiced. As a reminder, it is ingrained in our legal system that: Justice must not only be done but must also be seen to be done, and for this, without casting any aspersion to the integrity of both Ms Koe and Mr Su, I am not convinced by the argument advanced on this point. G H

Finally, on the question of jurisdiction, which I was initially rather concerned with, I am aided by the authorities of *Wong Sin Chong, PP v Vengadasalam & Ors* [1990] 1 MLJ 507 at p 511 and *Syarikat Pengangkutan* to say that I possess an inherent jurisdiction to order CTS from acting for the plaintiff in this suit. I

Conclusion

Accordingly, I hereby allow the defendants' preliminary objection and order CTS be prohibited from acting further for the plaintiff in this suit. There shall be no order as to cost. Further, in view of the disqualification of CTS, the hearing of the substantive issue in encl 5 must be adjourned to allow the plaintiff to appoint new advocates and solicitors to act for him.

Preliminary objection allowed.

Reported by Andrew Christopher Simon